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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DELGADILLO, Defendant and Appellant.	C037576 (Super. Ct. No. SCCRF00931)

A jury convicted defendant Michael Delgadillo of cultivation of marijuana and possession of marijuana for sale. (Health & Saf. Code, §§ 11358, 11359.)[1] Defendant argues the "trial court erroneously refused to permit [defendant] to present evidence of [his] mistake of fact" and "refused to instruct [the jury] on mistake of fact." Defendant claims he was under a "mistake of fact" that he was entitled to cultivate and possess marijuana for sale as a "primary caregiver" under section 11362.5 (the Compassionate Use Act). Defendant also contends he was "denied his rights to state and federal due

[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

process and to a . . . fair trial by the prosecution's reference to itself as the People." We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 26, 2000, Detective David Lee Rowe, of the Siskiyou County Sheriff's Department, and other law enforcement officers searched the defendant's property pursuant to a search warrant. In a shop on defendant's property, officers discovered an indoor marijuana growing operation.

In one room, the officers found eight or nine "mother" marijuana plants. In two other rooms, officers found 95 plants. Detective Rowe testified he believed the growth operation was a couple of weeks from full maturity.

The officers harvested two of the plants and were able to obtain approximately 0.9 ounces of marijuana buds from each. Thus, this growing operation represented approximately 5.9 pounds of marijuana buds.

The officers found high-powered lights, fans, chemicals and other supplies to support the growing operation. Wires were also strung between the rafters that could be used to dry the marijuana. The officers also found books on how to grow marijuana.

In defendant's home, the officers found $10,000 bundled into $1,000 increments of crisp $20 bills. The money was secured in a lockbox under the bed. The officers also found more marijuana, half-gallon sized plastic bags and a triple beam scale. In a freezer outside of the residence, the officers found more marijuana. The total weight of the marijuana from

the house and the freezer was 160.38 grams (a little over a third of a pound).

The officers also found a revolver, three rifles, and two 12-gauge shotguns in the house. None of the guns were loaded, but ammunition was located in the house.

Defendant told one of the officers he had been growing marijuana and admitted he had no other employment. Defendant set up the growing operation in his home over approximately a nine-month time frame at a cost of $5,000 to $6,000. This grow was the third growing cycle defendant had cultivated in this operation. The first grow of 40 plants yielded three pounds of dried marijuana and the second grow of 45 plants yielded four pounds. Defendant expected a yield of approximately one ounce per plant for his current crop of 95 plants. Defendant admitted to using the triple beam scale to weigh the marijuana and the plastic bags for packaging.

Based upon the substantial amount of marijuana being grown, the large amount of cash, defendant's lack of other income, the size of defendant's property, the presence of several cars, and the sophistication of the operation, Detective Rowe rendered his expert opinion the marijuana was possessed for sale.

The People filed an information charging defendant with cultivation of marijuana and possession of marijuana for sale. (§§ 11358, 11359.) The information also charged defendant was armed with a firearm in the commission of each offense. (Pen. Code, § 12022, subd. (a)(1).)

At trial, defendant presented argument and jury instructions he was under a mistake of law and fact concerning the Compassionate Use Act, codified at section 11362.5. Defendant offered the following two jury instructions: "An act committed by reason of a mistake of fact which disproves any criminal intent is not a crime. [¶] Thus, a person is not guilty of a crime if [he] [she] commits an act under an actual and reasonable belief in the existence of certain facts and circumstances which, if true, would make the act lawful. [¶] In this case evidence has been presented that defendant . . . believed that he was acting in a legal manner to grow and supply marijuana for the Bay Area Co-op. If you have a reasonable doubt as to whether [defendant] actually and reasonably believed he was acting in a legal manner to grow and supply marijuana for the Bay Area Co-op you must resolve that doubt in favor of the defendant and find the defendant not guilty." Defendant's alternative proffered instruction stated in relevant part: "In this case evidence has been presented that defendant . . . believed that under Proposition 215, and the agreement he had made with the Bay Area Co-op, it was legal for him to grow and distribute marijuana, defendant believed patients who received this marijuana were qualified for medical marijuana[]. If you have a reasonable doubt as to whether [defendant] actually and reasonably believed it was legal for him to grow and distribute marijuana you must resolve that doubt in favor of the defendant and find the defendant not guilty."

Defendant argued he believed it was lawful for him to sell marijuana to a cannabis club under the Compassionate Use Act. Defendant alternatively claimed he acted under a mistake of "fact" that he qualified as a "primary caregiver" under the Compassionate Use Act.

During his examination in an Evidence Code section 402 hearing outside the presence of the jury, defendant testified he provided the marijuana on a contract basis to the Cannabis Buyers Club that in turn furnished it to people who were too sick to grow it themselves. This way he was "able to provide [these patients with] continuing safety . . . to access their medicine." Defendant claimed he believed what he did complied with the Compassionate Use Act. The trial court rejected the proffered jury instructions, struck defendant's testimony and refused to allow defendant to testify on this subject.

The jury convicted defendant on both charges, but found the arming allegations not true. The trial court suspended imposition of sentence and placed defendant on three years' probation with the condition he spend 120 days in jail. Defendant appeals.

DISCUSSION

A. Mistake of Fact Evidence and Instruction

Defendant argues the court's exclusion of evidence and refusal to instruct the jury on his alleged mistake of fact is reversible error. In reality, defendant raises two intertwined defenses under the "rubric" mistake of fact. First, he contends he was mistaken that the Compassionate Use Act allowed him to

grow marijuana and possess this marijuana for sale. Second, defendant argues he was under a mistake of fact that he was a "primary caregiver" under the definitions contained in the Compassionate Use Act. We reject these arguments.

"[A] trial court's duty to instruct, sua sponte, or on its own initiative, on particular defenses . . . aris[es] 'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Barton* (1995) 12 Cal.4th 186, 195.)

"On the one hand, an '"'honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense . . . .'" [Citation.] "The primordial concept of *mens rea*, the guilty mind, expresses the principle that it is not conduct alone but conduct accompanied by certain specific mental states which concerns, or should concern, the law. . . ."' [¶] On the other hand, '"It is an emphatic postulate of both civil and penal law that ignorance of a law is no excuse for a violation thereof."'" (*People v. Young* (2001) 92 Cal.App.4th 229, 233-234.)

In *People v. Costa* (1991) 1 Cal.App.4th 1201, 1210-1211, the court explained the distinction between a mistake of law and a mistake of fact. There, defendant had been convicted of manufacturing amphetamine and making his home available for that purpose. (*Id.* at p. 1204.) Defendant claimed he assisted in

the manufacture process under the mistaken belief his codefendant was a police informant who was immune from prosecution under section 11367. (*Id.* at pp. 1210-1211.) Further, defendant believed he was entitled to immunity because he was helping his codefendant. (*Id.* at pp. 1210-1211.) The court concluded, "This defense consists of two mistakes, one of fact and one of law. [Defendant's] mistake of fact was believing that [his codefendant] was acting as a police informant. [Defendant's] mistake of law was believing that the statutory grant of immunity provided for by section 11367 extended to those who assist the informant. Even if [the codefendant] had been acting as an informant when he came to the [defendant's] home, his assurances to [defendant] that he was not going to do anything illegal did not make [defendant's] participation in the manufacturing of a controlled substance lawful." (*Id.* at p. 1211.) "[Defendant's] testimony reveals that he did intend to assist in the manufacturing of a controlled substance, but that he did not intend to break the law. Although we would expect this explanation, if believed, to influence a sentencing court, it is just that: an explanation rather than an excuse." (*Ibid.*) Defendant believed "that whatever immunity an informant had extended to him as well, which is an inexcusable mistake of law. [¶] Because the mistake of fact defense has no application to the facts of this case, the trial court had no duty to instruct on it." (*Id.* at p. 1212.)

With this in mind, we turn to defendant's contentions. In 1996, the voters of this state enacted the Compassionate Use Act "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes . . . ." (§ 11362.5, subd. (b)(1)(A).) Section 11362.5 provides: "(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician. [¶] (e) For the purposes of this section, 'primary caregiver' means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person."

Here, defendant failed to present any testimony he was mistaken about any of the facts that would bring the defense of mistake of fact into play. Defendant testified he provided the drug in significant volume to the Cannabis Buyers Club. While he stated he was providing the marijuana to fulfill "doctor's therapy recommendation[s]," he did not testify he believed he was directly providing marijuana to patients who had qualifying illnesses. Defendant did not testify he believed he was providing the marijuana to people who had a written or oral recommendation or approval of a physician. Defendant did not testify he believed any of these individuals had designated him as their primary caregiver. In short, he did not know to whom

the marijuana was being provided. Defendant did not testify he believed he had consistently assumed responsibility for the housing, health or safety of any person who designated him as their primary caregiver. His reference to providing a safe method of acquiring marijuana does not meet the requirements of the statutory definition of a caregiver. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1397 (*Peron*).) Defendant was not mistaken about any of the pertinent facts that might have established he thought he was a primary caregiver. As such, he was not entitled to pursue the defense of mistake of fact at trial. At best, defendant was under a mistake of law that the Compassionate Use Act made his actions legal. This provides him with no defense.

Despite the arguments proffered by defendant, the circumstances of this case do not provide us with the opportunity to examine the question of how a qualified individual patient or caregiver may obtain marijuana "legally"[2] under the Compassionate Use Act. We are not confronted with a patient with a recommendation who sought to purchase marijuana or transport it. We are not presented with a primary caregiver caught purchasing, growing or transporting marijuana to a qualifying patient in their care.

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[2] That is, legally, under California law.

B. Reference to Prosecution as the People

Defendant contends that the repeated references to the prosecution as "The People" throughout the trial of this case denied him his constitutional rights to due process and to a fair trial. Claiming that every federal district and the majority of states refer to the prosecution as either "The State," "The Commonwealth" or "The United States" and noting the federal Constitution's Preamble ("We the People"), defendant asserts that history and legal practice suggests referring to the prosecution (which represents the executive branch of the government and is part of the state) as "The People" violates defendant's substantive due process rights. With respect to his right to a fair trial, defendant argues that referring to the prosecution as "The People" "blurs and confuses critical distinctions" and suggests that a defendant is someone other than "The People."

This contention is frivolous. Referring to the prosecution as "The People" is consistent with statutory and decisional authority. For example, Government Code section 100, subdivision (b) provides: "The style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." In addition, Government Code section 26500 provides, in relevant part, as follows: "The district attorney is the public prosecutor . . . [¶] . . . and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for public offenses." Penal Code section 684

provides: "A criminal action is prosecuted in the name of the people of the State of California, as a party, against the person charged with the offense."

Case law has long been in accord. In *County of Modoc v. Spencer* (1894) 103 Cal. 498, 501, the court stated "[i]n the prosecution of criminal cases [the district attorney] acts by the authority and in the name of the people of the state." (See also *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 359.)

When the entire charge to the jury is considered, only one conclusion can be reached -- there was no error. The jury could not have been confused. We presume jurors are intelligent people capable of understanding the instructions given. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) That the prosecution was referred to as "The People" simply could not have been interpreted in the manner defendant asserts on appeal. Defendant has failed to demonstrate that his constitutional rights to due process and a fair trial have been violated by referring to the prosecution as "The People."

C. Mandatory Penalty Assessments and Restitution Fine

The trial court imposed the $50 mandatory section 11372.5 fee, but failed to impose the penalty assessments of $50 (Pen. Code, § 1464, subd. (a)) and of $35 (Gov. Code, § 76000, subd. (a)). These assessments are mandatory. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1520-1522.) As a result, the omission of the fine and assessments is an unauthorized sentence that we must correct regardless of whether an objection or argument was raised in the trial court or in the reviewing

court. (*People v. Smith* (2001) 24 Cal.4th 849, 854; compare *People v. Tillman* (2000) 22 Cal.4th 300, 303.) In the interest of judicial economy, we correct these unauthorized omissions without having requested supplemental briefing. A party claiming to be aggrieved by this procedure may petition for rehearing. (Gov. Code, § 68081.)

DISPOSITION

The judgment (order of probation) is affirmed. The trial court shall prepare an amended order of probation which shall include the $135 fee and penalty assessments under Health and Safety Code section 11372.5. The court shall send a certified copy of the amended order of probation to the defendant and his probation officer.

ROBIE, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.